

APPEAL NO. 93067

On December 17, 1992, a contested case hearing was held in (city), Texas, with (hearing officer). The issues considered were whether the claimant, (who is the respondent in this case) was tendered a bona fide job offer, whether Dr S was the claimant's treating doctor, and whether the carrier was entitled to recoupment because of an overpayment of temporary income benefits (TIBS) as a result of an auditing error. As a necessary part of the first issue, the hearing officer considered whether TIBS should be resumed if it was determined that a bona fide job offer (as that term is used in the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-4.23(f) (Vernon Supp. 1993) (1989 Act) was not made.

The hearing officer determined that a bona fide job offer had not been made that the claimant was reasonably capable of performing, that temporary income benefits were therefore due back to the date of suspension by the carrier (August 3, 1992), that Dr. S was the claimant's third choice of treating doctor, but that he was not the treating doctor, and that the carrier was not entitled to recoupment under the 1989 Act because the overpayment resulted from its own error.

The carrier has appealed this decision. It alleges that the hearing officer abused his discretion by changing the issues, and by finding (against the preponderance of the evidence) that no bona fide job offer was made. The carrier further asserts that the hearing officer should not have decided the recoupment issue because there was a "stipulation" between the parties on that issue, and that the decision against recoupment was erroneous. The carrier asserts that the hearing officer abused his discretion by acting as an advocate for the claimant. Finally, the carrier asserts that there was no evidence to support a finding of fact that another doctor had treated claimant for a period of 60 days. The claimant responds that the hearing officer did not abuse his discretion, that the evidence supports the decision, and that there was no stipulation as to the carrier's authority to recoup an overpayment that removed this issue from determination by the hearing officer.

DECISION

After reviewing the record, we affirm the determination of the hearing officer.

I

The claimant was employed by the employer, a sheetrock/ remodeling company, when he injured his back and shoulder. On (date of injury), a scaffold on which he was working fell, and he said that he strained himself as he attempted to swing from where he was hanging above the scaffold over toward the wall. The claimant was referred that day by the employer to (Dr. D). According to the claimant, Dr. D gave him a limited release, after diagnosing a strain. The claimant stated he requested, and was granted, an additional two days off, and returned Saturday. The claimant testified that he worked about 3-1/2 hours, but was sent home by the employer because he couldn't do the job.

The claimant said that he told the doctor next week what happened, and relayed his understanding that the employer had only heavy work. Dr. D took him off work; he continued to see Dr. D, for at least 60 days. Dr. D gave him medication and prescribed physical therapy. A series of medical reports in evidence from Dr. D were filed for visits from April 16 through June 15, 1992. These indicate a diagnosis of lower back pain, and state "off work". No notes are made in portions of the forms which inquire as to anticipated return to work dates. An MRI examination performed May 1, 1992 records an impression of "minimal bulges at L4-5 and L5-S1 centrally without evidence of disc herniation. No significant thecal sac compression."

The claimant stated that he was referred by Dr. D to Dr. Cornelius Matwijecky, M.D. (Dr. M), and that he spoke to Dr. M about steroid injections. A June 16, 1992 letter from Dr. M to Dr. D notes "lumbar pain syndrome" and recommends that claimant continue on conservative measures. The claimant stated that he decided he did not want suggested lumbar epidural steroid injections. He then decided to go to Dr. Bernie McCaskill, M.D. (Dr. McC), an orthopedic doctor, who had treated him once before for an ankle injury. The commission approved Dr. McC as the claimant's next treating doctor.

Claimant first saw Dr. McC on June 18, 1992; his last consultation was July 16, 1992. At Dr. McC's order, claimant had a functional capacity evaluation. A portion of Dr. McC's concluding notes summarize his ultimate opinions regarding claimant:

"I continue to feel that there is a significant problem regarding the patient's desire to return to work and his motivation in general. . . . I have told him that his choices at this point were either light duty return to work or a work hardening program. At that point the patient agreed to this program."

However, the claimant did not follow through with work hardening, and stated that he thought it would hurt him worse. He subsequently began treatment with Dr. Les Sandknop, D. O. (Dr. S), whose July 24, 1992 initial medical report states "absolutely no work."

In a release dated July 30, 1992, Dr. McC indicated that claimant could return to work or school, effective July 31st, under lifting restrictions of up to 10 lbs, with bending, stooping, twisting and sitting as tolerated. These restrictions were to be reviewed in thirty days.

The claimant stated that he feels he cannot twist or bend, and cannot sit for long periods of time. The claimant said that he had previously lifted weights but has not done so since the injury. He has attempted to take some courses at the University of Texas/ Dallas, which required sitting through three hour lectures, and had to drop one. Claimant's mother testified that he has been in considerable pain.

The claimant said that he was required to deliver Dr. D's reports personally to the employer, and the last time he went by was the date of his last visit, June 15, 1992. On at least that occasion, he agreed that (Mr. L), who was the employer's president, asked him about coming back to sort parts, sweep, or answer the phone. The claimant indicated that his response was that he was still under Dr. D's off work. The claimant testified at the hearing as to various reasons that he felt he would not be able to perform various functions for the employer, although he acknowledged he could pick up a telephone.

Mr. L indicated that what he had "in mind" for the claimant would have been some sweeping or parts sorting work. He indicated that he never told anyone it would be less than the eight dollars an hour that claimant made when he was injured. He stated that the work envisioned would not be part-time, but would be forty hours a week. When questioned about clerical work that may have been intended, Mr. L indicated that it would be his wife who would know the details of this, because she was the one who made "that offer." Mr. L indicated that in the past his company had found work for injured employees to do. Mr. L stated his belief that the work that claimant would have been asked to do would be consistent with Dr. McC's restrictions. Mr. L stated that his job offer had been open for seven weeks, until August 14, 1992. As to how long the light duty would have lasted if accepted, Mr. L indicated that he expected that claimant would improve after a few weeks, and then resume the job for which he was hired, although he would "play it by ear."

Mr. L testified at length on direct and cross examination about what his intentions were or what he envisioned the claimant would do. However, there was much less testimony as to how or when such intentions were communicated to the claimant, with most information about any verbal offers being developed through the hearing officer's questions. Mr. L stated that claimant came by the office and he would talk to him then, and that the first such conversation occurred on June 21, 1992, after claimant's second visit with Dr. D. Mr. L indicated that he would say ". . . if you'd rather work than stay home, we'll find something for you to do that you can do." Or he would ask claimant how he was doing and "did he think there was anything he could do." He said that he recalled talking with claimant about there being work in the warehouse. Mr. L indicated that he reiterated words similar to those set out in a June 24th letter sent to the claimant. Mr. L testified that claimant said each time that he came by the office that he was not able to go back to work. Mr. L was unable to contact claimant otherwise because claimant did not have a telephone. He decided to write the letter on June 24th to document the offers, and sent it certified mail.

The letter dated June 24, 1992 states, after noting regret for the injury and observing that most of employer's work requires physical tasks, states:

"However, there have been occasions in the past and also under current conditions where we have positions available that do not require any physical exertion, bending, or lifting. We have offered you that option whether it be sweeping

floors, answering the phone, parts sorting or other task you may feel comfortable in performing. Please contact this office upon receipt of this letter to establish a time to report for work."

Mr. L acknowledged, when questioned by the hearing officer, that he did not at this time know who the claimant's treating doctor was.

On August 12, 1992, Mr. L wrote another certified letter to claimant that said:

"We have been informed by our insurance company that your doctor has released you for light duty work on Thursday, July 30th. You have not called or reported for work since that date. We will hold your job open for two days from the date of this letter. As per the Texas Workers' Compensation Rules, Board Rule #129.5(b), if you do not report for work, we will no longer hold the position open for you."

Mr. L stated that he was aware that claimant had been sent home when he was unable to perform work the Saturday after his injury. Mr. L indicated that he felt that the wage was disclosed in his August 12th letter "by inference" because it refers to holding open claimant's job, which had paid him \$8 per hour.

II

WHETHER A BONA FIDE OFFER OF EMPLOYMENT WAS TENDERED TO THE CLAIMANT SUCH THAT THE TEMPORARY INCOME BENEFIT MAY BE REDUCED UNDER ARTICLE 8308-4.23(f).

While the record contains some information from which it can be inferred that the claimant is unwilling to work to an extent not fully explained by his injuries, that was not the issue before the hearing officer. The issue was whether the claimant's TIBS may be reduced by attributing to him a weekly wage which he could have earned had he accepted an offer of a "bona fide position of employment". Article 8308-4.23(f).

An offer of employment that meets the criteria of Article 8308-4.23(f) and the implementing administrative rule found at Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5 (Rule 129.5) does not necessarily equate to an ending of "disability"¹, but rather permits an offset for purposes of calculating the amount of the TIBS. According to that statute, the weekly wages offered will be attributed to the injured employee as weekly

¹ Disability is defined in Article 8308-1.03(16) as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury."

earnings after an injury, even though he refused the job. However, the job must be "offered", and it further must be a position that the employee is reasonably capable of performing, given the geographical accessibility and physical condition of the employee.

As the Appeals Panel has noted before, (and notwithstanding the inaccurate instruction given by the hearing officer at the beginning of the hearing), the carrier has the burden of proving that a bona fide offer was made. Texas Workers' Compensation Commission Appeals Decision No. 92235, decided July 20, 1992. A written offer must clearly state the elements set forth in Rule 129.5(b) in order to be presumed to be a bona fide offer. A verbal offer, or a writing which does not comply with Rule 129.5(b), must be proven by clear and convincing evidence to be a bona fide offer of employment. See Texas Workers' Compensation Commission Appeal No. 91127, decided February 12, 1992.

Commendable as the employer's good intentions were, the hearing officer has correctly determined that a bona fide offer was not made as required by the statute and rule. There is sufficient evidence in the record to support the hearing officer's finding that neither of the employer's letters sets forth a wage, states the location of the job, or the maximum physical requirements of the job. We would observe that the hearing officer could also have found that neither letter clearly states the position offered or the duties of the position. Indeed, were we to ascribe error to the hearing officer's findings of fact, it would be in characterizing the writings as an "offer", as opposed to a general expression of intent to make specified work available to the claimant, at undisclosed hours, and undisclosed wage.

As the Appeals Panel has noted before, Article 8308-4.23(f) plainly requires more than expression of a sympathetic motive or simple intent to offer work once a claimant's physical restrictions are established, before the TIBS can be reduced. In another case, with facts similar to this one, the Appeals Panel stated:

"Absent a commonly understood definition of what constitutes 'light duty', we are unable to ascertain how the hearing officer determined that the generalized 'offer' was one meeting the requirements of the statute and rules. . . . [carrier's] burden is not discharged by [claimant's] admission that she has received a general offer, verbally, of 'light duty' work when it is also her assertion she cannot do the work." Texas Workers' Compensation Commission Appeal No. 92432, decided October 2, 1992.

We have further noted that Article 8308-4.23(f) does not require the claimant to accommodate to an offer, or seek out the continued existence of an offer, once it is made. Rather, an offer meeting the requirements of the statute and Rule 129.5 must be proven before TIBS can be reduced. Texas Workers' Compensation Commission Appeal No.

92293, decided August 17, 1992.²

Dr. D, who the hearing officer found was the claimant's first treating doctor, noted as late as his report of June 15, 1992, that the claimant was "off work." There is nothing in the record indicating that the employer sought clarification from Dr. D as to what the claimant was capable of doing in terms of what the employer could make available. Thus, the verbal "offers" made by Mr. L during this time period would have been made when no release to even light duty work had been made by Dr. D. The only "offer" that appears to have been generated in response to Dr. McC's release was the letter of August 12th. All in all, given the amorphous and undetailed quality of the communications to the claimant about employment positions, and the lack of correlation to the physical restrictions or abilities of the claimant, we agree that there was sufficient evidence for the hearing officer to conclude that the essential elements of a bona fide job offer were missing, and that a bona fide job offer was not made. The letters did not satisfy the requirements of Rule 129.5(b) for a written offer so as to permit the presumption of a bona fide offer. Nor did the carrier's evidence amount to "clear and convincing evidence that a bona fide offer was made." Rule 129.5(b).

III

WHETHER THE HEARING OFFICER ABUSED HIS DISCRETION BY CHANGING TWO ISSUES AND DENYING CARRIER'S MOTION FOR CONTINUANCE

Without describing how it was prejudiced thereby, the carrier argues that the hearing officer abused his discretion by changing the issues and denying its motion for continuance. After review of the record, we do not agree that the issues were changed, and find that any rewording of the issues was consistent with the issues mediated at the benefit review conference.

The carrier was not represented at the benefit review conference by the attorney who appeared at the contested case hearing. Perhaps because of this, initial discussion of the issues at the hearing was protracted.

The issues at the heart of this point of error were characterized by the hearing officer as

1. Should temporary income benefits be resumed beginning August 3, 1992 because there was no bona fide offer of employment?

² For an example of the type of "offer" that the Appeals Panel has noted is the type contemplated by Article 8308-4.23(f), the carrier is referred to page 3 of Texas Workers' Compensation Commission Appeal No. 92637, decided January 11, 1993.

2. Is Dr S the Claimant's treating doctor?

These issues were stated in the benefit review officer's report as "Was there a bona fide offer of employment?" and "Whether Dr. S is the employee's third choice of doctor." The report also notes that claimant's position on bona fide job offer is that TIBS should be resumed from August 3, 1992 because there was no job offer in compliance with his doctor's restrictions. As to the Dr. S issue, the report's recommendation and comment makes clear that he was the employee's third "treating" doctor.

Thus, in both cases the hearing officer plainly clarified the wording of the issues, and did not change them. Whether the carrier's attorney was personally present or not, it seems to us that "notice" of the matters discussed is unambiguously conveyed by the benefit review conference report. An award of benefits due is an element required in the hearing officer's decision. Article 8308-6.34(g). Finally, the matters were fully litigated at the contested case hearing. The carrier's contention that the hearing officer abused his discretion is rejected. See Texas Workers' Compensation Commission Appeal No. 91076, decided December 31, 1991.

IV

WHETHER THE HEARING OFFICER ABUSED HIS DISCRETION AND BECAME AN ADVOCATE FOR THE CLAIMANT

On appeal, and several times during the hearing, the carrier objected to the hearing officer's questions of the parties' witnesses, which it characterized as the hearing officer's "advocacy" on behalf of the claimant. A specific example cited by the carrier concerns the exclusion of Carrier Exhibit No. 17, which was not exchanged prior to the hearing, as required by Article 8308-6.33(d), and which was therefore properly excluded under Article 8308-6.33(e). The carrier's argument that the hearing officer was biased is not well-taken.

The hearing officer is specifically authorized by statute to "ensure the preservation of the rights of the parties and the full development of facts required for determinations to be made." Article 8083-6.34(b). During the hearing, the carrier tendered Exhibit No. 17 and the claimant objected that it was hearsay and also said: "I've never seen it before today." After the witness identified the document for the hearing officer, the hearing officer returned to the comment that the claimant previously made and asked him if it was true he hadn't seen the document before. The hearing officer then asked the carrier's attorney if it had been exchanged, and determined that it had not. The hearing officer then ruled, correctly, that the document would not be introduced into evidence based upon the failure to exchange. Article 8308-6.33(e).

The carrier notes that the information sought by the hearing officer through his

questions "was intended to benefit the claimant." The carrier does not contend that untrue or irrelevant information was elicited through the hearing officer's questions. The carrier cites no authority as to how, or why, questions posed by the hearing officer would constitute reversible error.

We find no support in the record for the contention that the hearing officer abused his discretion through any of the questions he asked. The carrier objected, for example, when the hearing officer asked the employer's president if he knew who the claimant's doctor was at the time he wrote a letter characterized by the carrier as a bona fide job offer. Rule 129.5(b) states that a written offer may qualify as a presumptive bona fide offer if, among other things, it is based upon the physical limitations authorized by a treating doctor. Logic, and the responsibility fully develop the facts (Article 8308-6.34(b)), plainly indicated the advisability of a question concerning the employer's knowledge of the identity of the treating doctor at the time the offer is made, especially in light of the failure of either party to elicit this evidence.

V

WHETHER THE HEARING OFFICER ERRED BY DETERMINING THE ISSUE OF RECOUPMENT, AND BY DENYING RECOUPMENT

Both parties agreed and the hearing officer found that claimant was overpaid in excess of \$3,000 of benefits due to the carrier's miscalculation of the date lost time began. The claimant stated that he agreed in principle to paying the money back but was concerned about how much would be taken out of his check. There was no evidence or assertion that the over payments were obtained through fraud. The claimant testified that he had tried to contact the adjuster to inform him of an error but his calls were not returned.

However, the record does not support the carrier's assertion that there was actually "a stipulation" that carrier was entitled to obtain recoupment. Even if there had been, entitlement under the 1989 Act to recoupment is not a fact question, but a legal question, and the hearing officer would not be bound by any such stipulation. City of Houston v. Deshotel, 585 S.W.2d 846 (Tex. Civ. App.-Houston [1st Dist.], no writ).³

We have previously discussed fully the lack of authority in the 1989 Act for involuntary recoupment in such circumstances under the 1989 Act, Texas Workers' Compensation Commission Appeal No. 92291, decided August 17, 1992. The hearing officer's decision is consistent with that decision, and was not erroneous.

³ However, there is nothing in the 1989 Act to preclude an agreement between the parties to pay erroneously-paid amounts back to the carrier.

VI

WHETHER THE FINDING OF FACT REGARDING DURATION OF TREATMENT
BY DR. D WAS ERRONEOUS

Rule 126.7(f) indicates that a doctor referred by the employer becomes a claimant's treating doctor if he continues to treat the claimant for a period of sixty days. That clearly happened in this case and resulted in a finding by the hearing officer, sufficiently supported by the record, that Dr. D was claimant's first treating doctor. Although it would make no difference concerning Dr. D's status as treating doctor, as concluded by the hearing officer, the carrier argues that the fact finding should have been that treatment by Dr. D lasted for "more than" 60 days. The hearing officer's finding is supported by the evidence and carrier's point of error is overruled.

The hearing officer is the sole judge of the relevance and materiality, as well as the weight and credibility of the evidence offered in a contested case hearing. 1989 Act, Article 8308-6.34(e). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We affirm the decision of the hearing officer.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge